Asia Pacific Guide to Lending and Taking Security - Indonesia

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# When considering whether to lend

## 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

No. It is not necessary for an offshore lender, arranger, facility agent or security agent to be licensed, qualified or entitled to do business in the Republic of Indonesia because of its execution, delivery or performance of the Asia Pacific Loan Market Association facility agreement (or other facility agreement), fee letters, Indonesian law security documents, intercreditor agreement, account management agreement and subordination agreement ("**Finance Documents**") or to exercise or enforce any of its rights under the Finance Documents in the Republic of Indonesia.

## 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

No. An offshore lender, arranger, facility agent or security agent is not deemed to be resident, domiciled or carrying on business in Indonesia by reason only of the negotiation, preparation, execution, delivery, performance or enforcement of or receipt of any payment under the Finance Documents if the offshore lender, arranger, facility agent or security agent is not deemed to have a presence in Indonesia (e.g., no presence of their employees for more than the time test under the Indonesian Income Tax Law, which is 60 days within a 12-month period).

## 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

No. Lenders are not required to do any reporting. However, Indonesian borrowers receiving offshore loans from foreign lenders are subject to periodic reporting of offshore loans to Bank Indonesia (Indonesia's central bank) and the Ministry of Finance of the Republic of Indonesia.

## 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

Generally, it is not necessary for offshore entities to establish a place of business in the jurisdiction of the Republic of Indonesia to enforce any provision of the Finance Documents.

## 5. Is a foreign bank/financial institution permitted to approach local entities for business?

Assuming that the business is involved in lending activities, a foreign bank/financial institution is generally permitted to approach local entities for business. If the business is related to offering hedging or structured products, there are certain restrictions or prohibitions (e.g., requiring approval from Bank Indonesia) on offering the products to local entities.

# When lending to borrowers

## 1. Are there any restrictions in relation to the type of borrower who may borrow foreign currency or in relation to the term of foreign currency and/or the amount of foreign currency borrowed by local entities?

To the best of our knowledge, Indonesian borrowers are not restricted from borrowing in foreign currency. However, there are restrictions on the use of foreign currency in Indonesia (international financing transactions are exempted) and on the type of borrower that may borrow from foreign lenders.

Approval from the Minister of Finance

The ministries, regional governments and regional-government-owned entities are prohibited from receiving offshore loans.

Generally, Indonesian state-owned entities may only receive offshore loans if the offshore loan does not require a guarantee or collateral from the government of Indonesia, including Bank Indonesia or other state-owned banks, for the repayment, and if it will not give rise to any obligation from the government of Indonesia because of the acceptance of the offshore loan. However, there could be exceptions as may be determined by the government of Indonesia.

Indonesian state-owned entities and regional-government-owned entities are prohibited from providing security or acting as guarantors for the repayment of offshore loans received by state-owned entities, regional-government-owned entities or private companies.

The Minister of Finance must approve the offshore loan granted to a state-owned entity after hearing opinions from the Minister of the National Planning Agency, the Governor of Bank Indonesia and the Director General of Budget Financing and Risk Management.

Specific approval for certain industries

Specific approval is required for certain industries. In the banking industry, for example, a bank intending to obtain a long-term offshore loan (i.e., a loan having a tenor of more than one year) is required to obtain approval from Bank Indonesia. The application for approval must be submitted at least one month prior to receiving the offshore loan. Mining companies must also obtain approvals from the Minister of Energy and Mineral Resources before obtaining loans.

Local entities

There are no restrictions in relation to the term or the period and/or amount of foreign currency loans borrowed by local entities in Indonesia.

## 2. Are there any restrictions on the rate of interest or default interest that may be charged?

There are no restrictions on the rate of interest or default interest that may be charged. However, in two cases over approximately the past 20 years, the court decided to modify the agreed interest rate. The court did not provide any specific reasoning but in both cases, the court mentioned that the interest rate needed to be modified to be in accordance with the average interest rate applicable to state-owned banks and, in the earlier case, the court made several references to "justice".

As Indonesia is a civil law jurisdiction, court decisions do not create precedent in Indonesia. Court decisions are only final and binding on the parties to the case.

For Indonesian tax purposes, if the lender and borrower are related parties, the interest rate used must be the market rate.

## 3. Are there any restrictions on particular lenders or classes of lender entering into credit transactions with borrowers?

No, there are no such restrictions.

## 4. Are there any exchange controls that will apply to payments to be made in foreign currencies or to foreign lenders?

The purchase and sale of foreign currency between banks and their customers is subject to the following requirements:

The exchange of rupiah into foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a cash transaction per month per customer in the foreign exchange market.

A customer's purchase of foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a derivative exchange rate forward transaction per month in the foreign exchange market.

A customer's sale of foreign currency without an underlying transaction is limited to USD 5 million or its equivalent for a derivative exchange rate forward transaction per transaction in the foreign exchange market.

A customer's purchase of foreign currency without an underlying transaction is limited to USD 100,000 or its equivalent for a non-forward derivative exchange rate transaction per month in the foreign exchange market.

A customer's sale of foreign currency without an underlying transaction is limited to USD 1 million or its equivalent for a non-forward derivative exchange rate transaction per transaction in the foreign exchange market.

Any purchase or sale of foreign currency above these limits must be supported by an underlying transaction. The maximum amount of foreign currency that can be purchased is equal to the value of the underlying transaction.

Rupiah transactions

Bank Indonesia has issued regulations on transactions in the foreign exchange market, as well as a policy on the use of rupiah in international activities ("**BI Forex Regulations**"). The BI Forex Regulations stipulate certain restrictions in respect of transfer overseas of rupiah, which include that onshore banks are prohibited from transferring rupiah overseas. However, Bank Indonesia provides an exemption to carry rupiah, and use rupiah offshore for the purpose of international activities that will be further stipulated in an implementing regulation to be issued by Bank Indonesia.

Onshore banks may transfer rupiah to an onshore account of a non-resident or to an onshore account jointly owned by a resident and a non-resident, provided the following conditions are met:

The nominal value does not exceed the equivalent of USD 1 million per transaction, or such transfer is made between rupiah accounts owned by the same non-resident.

If the value exceeds USD 1 million per transaction, the recipient bank of such transfer must ensure that the non-resident has an Underlying Transaction.

An "Underlying Transaction" is defined as an activity underlying the purchase or sale of foreign currency against rupiah, which includes the following:

Activities in the current account, such as export, import and income transfer (primary and secondary).

Activities in the financial account, such as foreign direct investment and portfolio investment.

Activities in the capital account, such as capital transfer.

Loans or financing from onshore banks to a resident for the purpose of investment and trade.

Trading of domestic goods and services.

Other underlying transactions stipulated by Bank Indonesia.

## 5. Is there any requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender (whether domestic or foreign)? If so, at what rate must tax be deducted and from what kinds of payment?

The borrower is required by the laws of the Republic of Indonesia to withhold tax at a rate of 15% if the lender is an Indonesian tax resident and is not a bank in Indonesia; or 20% or the reduced withholding tax rate under the relevant tax treaty if the lender is a non-Indonesian tax resident from any payment of interest and any other payment of a similar nature in relation to loan documents.

## 6. Are there any “thin capitalization” or other rules that may limit the extent to which interest payments may be deducted for tax purposes?

The Minister of Finance issued Regulation Number 169/PMK.010/2015 on the Determination of the Debt-to-Equity Ratio (DER) for Companies to Calculate Income Tax ("**Regulation 169**"). Regulation 169 stipulates that the maximum permissible DER for income tax purposes is 4 to 1.

Regulation 169 is only applicable to corporate taxpayers whose capital consists of shares. Generally, however, there are six types of corporate taxpayers whose capital consists of shares that are not subject to this regulation, i.e., corporate taxpayers engaging in the following:

The banking sector

The financial institutions sector

The insurance and reinsurance sector

The oil and gas sector, which is based on production-sharing contracts, contracts of work or other mining cooperative agreements that do not set out a DER requirement

Business activities where the income is subject to final income tax

The infrastructure sector

If corporate taxpayers that are not exempted from Regulation 169 cannot meet the requirements under Regulation 169, their deductible borrowing costs will be limited to an amount that is in line with the 4 to 1 DER.

Regulation 169 also requires taxpayers that have foreign loans from private parties to report the amount of the loan to the Director General of Tax. If the taxpayers do not report the loan, the borrowing costs related to the loan cannot be deducted for tax purposes. The procedure to report the loan will be regulated further in a regulation that will be issued by the Director General of Tax.

## 7. Are there any registration, notarization, translation or reporting requirements in relation to the loan documents?

Registration and notarization

There are no registration or notarization requirements in respect of the loan documents, except as follows:

Fiducia security must be made in notarial deed form and in the Indonesian language, and it must be registered with the relevant fiducia registration office through the fiducia registration online system (which can only be accessed by a notary).

A hak tanggungan (a security right over a land right) must be made in a Pejabat Pembuat Akta Tanah (PPAT) (land deed official) deed form and in the Indonesian language, and it must be registered with the relevant land office. The registration of a hak tanggungan can be done through an online system.

A hypothec over a vessel must be made in a grosse deed form and in the Indonesian language, and it must be registered with the relevant ship registration and recording official (Pejabat Pendaftar dan Pencatat Balik Nama Kapal).

A security over warehouse receipts must be made in an agreement and should be registered with the Warehouse Registration and Management Center (Pusat Registrasi dan Pengelola Gudang). The registration is submitted to the Monitoring Body (Badan Pengawas) in a form that is determined by the Monitoring Body.

Further information about fiducia security, hak tanggungan, hypothec and security over warehouse receipts is set out in the answer to question 10 of the "If taking security" section.

Translation

On 9 July 2009, the government of Indonesia enacted Law No. 24 of 2009 on National Flag, Language, Emblem and National Anthem dated 9 July 2009 ("**Law 24**"). Law 24 requires implementing regulations to be issued within two years after 9 July 2009. On 1 March 2010, the president of Indonesia issued Presidential Regulation No. 16 of 2010 on the Use of  Indonesian Language in Official Presidential and/or Vice Presidential as well as other State Officer Speeches ("**PR 16**"). On 30 September 2019, the president of Indonesia issued Presidential Regulation No. 63 of 2019 on the Use of Indonesian Language ("**PR 63**"), which was only made public on 9 October 2019. PR 63 basically revokes PR 16 and further stipulates the use of Indonesian language.

Article 31.1 of Law 24 and Article 26.1 of PR 63 require the use of Indonesian language in memoranda of understanding and agreements involving state institutions (lembaga negara), Indonesian government authorities (instansi pemerintah Republik Indonesia), Indonesian private institutions (lembaga swasta Indonesia) or Indonesian individuals (perseorangan warga negara Indonesia). The elucidation of Article 31 of Law 24 states that an agreement in this context includes international agreements made within the framework of public international law.

The applicability of Law 24 and PR 63 would affect the execution of the loan documents by Indonesian individuals or Indonesian private institutions with offshore parties. Article 31.1 of Law 24 and its elucidation and Article 26.1 of PR 63 are not particularly clear on whether: (a) the term "Indonesian private institutions" includes Indonesian companies or Indonesian branches of foreign companies; and (b) the term "agreements" includes private commercial agreements.

Article 31.2 of Law 24 and Article 26.2 of PR 63 further state that if the memoranda of understanding or agreements involve foreign parties, the national language of those foreign parties and/or the English language can also be used. Please note that the elucidation of Article 31.2 states that if an agreement is executed in multiple languages, (i.e., Indonesian language, the national language of the foreign party and/or English), each version will be equally authentic. Law 24 and PR 63 seem to also imply that the use of other language(s) in an agreement can only be done in agreements involving foreign parties, although Law 24 and PR 63 do not explain the form of the involvement being referred to.

Article 26.3 of PR 63 stipulates that the national language of those foreign parties and/or the English language are or is used as an equivalent or translation of the Indonesian language version to reconcile the understanding of the agreement with the foreign parties. This seems to imply that the Indonesian language version would need to exist first before the national language of those foreign parties and/or the English language versions exist because the non-Indonesian language version is a mere "equivalent" or "translation," and therefore the logical consequence would be that at the very least both versions or a bilingual form will need to be signed at the same time.

Article 26.4 of PR 63 further stipulates that if there is the national language of the foreign parties and/or the English language version, parties to an agreement may contractually choose the governing language of the agreement, which shall prevail upon any inconsistencies between the language versions. Law 24 and PR 63 do not provide for any sanction for failure to comply with the above requirements.

Reporting obligations

A company (as defined in the Bank Indonesia foreign exchange activities reporting regulations) intending to obtain offshore loans is required to submit reports to Bank Indonesia in relation to its offshore loan plan by 15 March of the relevant year.

In addition, a company (including state-owned entities) that has offshore loans in place must submit monthly reports to Bank Indonesia and the Ministry of Finance of the Republic of Indonesia on or before the 15th of the following month. The reports must provide details of the facility agreement and its implementation including the receipt of any disbursements, making interest payments and repaying principal. Subsequent periodic reports must be made in accordance with the prevailing laws and regulations.

Further, any company that has an offshore loan in place must implement prudential principles and submit its implementation reports and financial information to Bank Indonesia.

In addition to the above requirements, certain types of offshore loans must be withdrawn from a bank that is licensed by Bank Indonesia to trade foreign currency ("**Bank Devisa**"). These offshore loans are those arising from one of the following:

Non-revolving loan agreements.

Debt securities in the form of bonds, medium-term notes, floating rate notes, promissory notes and commercial paper.

Any discrepancy between the amount of a new offshore loan being used to refinance an existing offshore loan and the amount of the existing offshore loan that is being refinanced.

The monthly report to Bank Indonesia for this type of loan must be accompanied by a supporting document evidencing that the company has withdrawn the offshore loan from a Bank Devisa.

## 8. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in relation to the loan documents? If yes, what are the amounts and when are they payable?

Other than the registration fees for the registration of the security as set out in the answer to question 7, no registration tax, documentary tax or other similar taxes are payable under the laws of the Republic of Indonesia in relation to loan and security documents. However, as of 1 January 2021, stamp duty at the rate prescribed under Law of the Republic of Indonesia No. 10 of 2020 on Stamp Duty, i.e., IDR 10,000 is payable on each of the loan and security documents. The stamp duty becomes payable when a document is executed when a document is made, when a document is handed over to the party for whom the document is made, when a document is presented before an Indonesian court, or when a document will be used in Indonesia (if it has been executed outside of the Republic of Indonesia).

In addition to the IDR 10,000 stamp duty, a non-tax state revenue (Penerimaan Negara Bukan Pajak (PNBP)) is payable in relation to certain security documents. The amount of the relevant PNBP is set out in the answer to question 11 of the "If taking security" section.

## 9. Does the law recognize the subordination of the debt that a debtor owes to one creditor to that which the debtor owes to another creditor? If yes, how is this usually effected?

Indonesian law recognizes the concept of debt subordination. The subordination is effected in a subordination agreement between the debtor, subordinated/junior creditor and the senior creditor. Under the subordination agreement, claims of the subordinated/junior creditor are subordinated to the claims of the senior lender until the debt owed by the debtor to the senior creditor is paid in full.

## 10. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s other unsecured and unsubordinated creditors (e.g., the claims of employees and tax authorities or the claims of creditors under particular kinds of instrument)? If yes, what classes of creditors are preferred?

Claims are paid in the following descending order of priority:

Court costs of foreclosure in relation to movable and immovable goods, paid from the proceeds of the foreclosure

Tax liens

Secured creditors (e.g., pledgees, hak tanggungan holders and fiducia security grantees)

Unsecured creditors holding limited privileged claims in relation to specific assets under Article 1139 of the Indonesian Civil Code (ICC)

Unsecured creditors holding general privileged claims in relation to all assets generally under Article 1149 of the ICC

All remaining claims, i.e., unsecured or concurrent claims

**Limited privileged claims**

The limited privileged claims under Article 1139 of the ICC are as follows:

Court costs and fees (incurred by the court to conduct an auction over the movable or immovable goods of a debtor)

Claims relating to the leasing of immovable property, including repair costs which are borne by the lessee and all claims relating to any leasing agreement

Any unpaid purchase price in relation to movable property

Any costs incurred to preserve goods

Repairman’s costs

Any unpaid claims of a hotel owner against its guests

Transportation costs and other additional costs

Reimbursement of payments made by public officers

**General privileged claims**

The general privileged claims under Article 1149 of ICC are as follows:

Court costs (for auction and settlement of inheritance)

Funeral costs

Costs for medical treatment

Laborers’ wage claims

Claims in relation to the supply of food for the preceding six months

Claims for boarding school fees for the previous year of study

Claims from underage persons and persons under guardianship in relation to their guardians

## 11. Are there any consumer protection or similar laws that apply if credit is made available to individuals or other classes of debtor? If yes, what laws are applicable?

There is a consumer protection regulation in relation to the financial services sector administered by the Financial Service Authority (Otoritas Iasa Keuangan (OJK)). The regulation applies to financial services business providers and consumers. The protection provided under the regulation is in relation to the giving of information by the financial services business provider to its consumers. The obligations imposed on the financial services business provider include giving clear and accurate information about products and services and providing the information in either Indonesian language or with a translation of the non-Indonesian language into Indonesian language.

## 12. Are there any prohibitions or limitations on the extent to which a company can give financial assistance for the purchase of: (a) its own shares or those of any affiliated company; or (b) assets owned by it or any affiliated company?

There is no prohibition under Law no 40 of  2007 on Limited Liability Company (Company Law)  in relation to a company giving financial assistance for the purchase of its own shares or those of any affiliated company or assets owned by it or any affiliated company. However, there are some limitations in relation to the purchase by a company of its own shares.

Under the Company Law, the company may repurchase issued shares under the following circumstances:

The repurchase of those shares does not cause the net assets of the company to become less than the subscribed capital plus the mandatory reserves that have been set aside.

The total nominal value of the shares repurchased by the company and the pledge of shares or the fiducia security over shares held by the company and/or other companies whose shares are directly or indirectly owned by the company do not exceed 10% of the amount of subscribed capital in the company unless otherwise provided in capital market regulations.

The Company Law further stipulates that the shares repurchased by the company may only be held by the company for a maximum of three years.

The purchase of shares in a company (Company A) by a company (Company B) that is owned directly or indirectly by Company A is prohibited by the Company Law because the purchase will cause a cross-shareholding issue between Company A and Company B.

Furthermore, under the Company Law, there is no prohibition or limitation in relation to a company purchasing assets owned by an affiliated company.

Nevertheless, for transactions involving a listed company or its controlled company (defined in OJK Rule No. 42/POJK.04/2020 on Affiliated Party Transactions and Conflict of Interest Transactions ("**OJK Rule 42**")), capital market regulations in relation to affiliated party transactions and conflict of interest transactions might apply depending on the nature of the transaction, the relationship between the parties, and the value of the transaction. A transaction by a publicly listed company or its controlled company having a certain value that falls under the materiality threshold set out in the prevailing regulation (i.e., OJK Rule No. 17/POJK.04/2020 on Material Transactions and Change of Business Activity) will also be subject to certain procedures.

# If taking security

## 1. Are there any classes of unsecured and unsubordinated creditor whose claims against a debtor would rank equally with or above those of the debtor’s secured creditors?

There are some claims that rank higher than those of the debtor's secured creditors. Please see the answer to question 10 of the "When Lending to Indonesian Borrowers" section.

## 2. May security given by a company rank in a specified order so as to secure liabilities owed to different creditors of the company in that order and, if that is not possible, is it viable for parties to enter into a contractual arrangement for the purposes of moderating this order?

Only a hak tanggungan (a security right over a land right) and hypothec over a vessel given by a company may rank in a specified order. If a plot of land is subject to more than one hak tanggungan, they are ranked according to their respective dates of registration. If more than one hak tanggungan is registered on the same date, they are ranked according to the number written on their respective deeds of hak tanggungan. A vessel can be encumbered by more than one hypothec, and they are ranked according to their respective dates and numbers written on their respective deeds of hypothec.

Other than a hak tanggungan and hypothec as described above, it is not possible to enter into a separate security agreement to specify the ranks of the security for other security rights as the law prohibits having double security on certain security rights. In addition, certain security rights such as a hak tanggungan, hypothec and fiducia security will come into existence and they will become perfected when they are registered in accordance with their respective regulations. Without this registration, the security holder will not have a priority right against other security holders. However, it is possible for the creditors to enter into a security sharing agreement where the parties, among other things, contractually agree to the following: (i) to have different classes of creditors; and (ii) to have a priority mechanism over the proceeds' distribution upon the enforcement of such security.

## 3. Does this jurisdiction recognise the concept of floating security or similar equivalent (i.e., security over a changing pool of assets that the company giving the security is free to buy, sell and generally deal with)?

Indonesian law does not recognize the concept of floating charge per se. However, under Indonesian law, there is the concept of fiducia security. Fiducia security is the granting of security by which the ownership title of the secured object is transferred by way of fiduciary to the fiducia security holder, but the fiducia security grantor is allowed to use (or continue to use) the secured object. In relation to an item of inventory, the fiducia security grantor is allowed to sell the inventory as long as it is replaced with an object of equal value.

Fiducia security must be registered at a fiducia registration office. Fiducia security can be established in relation to fiducia objects that exist now or that will exist in the future. Therefore, a fiducia security agreement usually includes provisions that oblige the fiducia grantor to provide a periodic update of the fiducia objects and obliges the fiducia security holder to register the fiducia security on receipt of the update. Further details in relation to fiducia security are set out in the answer to question 11 of this section.

## 4. If so, are there any practical reasons why floating security is difficult to take, maintain or enforce?

Not applicable.

## 5. May security be granted to a trustee to be held on trust for the lenders from time to time, in such a way that a change of lenders does not require new security to be taken?

Except for the concept of: (i) trustee (wali amanat) as stipulated under Law No. 8 of 1995 on Capital Markets and Law No. 19 of 2008 on Sovereign Sukuk (Surat Berharga Syariah Negara); and (ii) special purpose vehicle (badan pengelola instrumen keuangan) and trust fund manager (pengelola dana perwalian) established to carry out securitization and trust fund activities as stipulated under Law No. 4 of 2023 on Development and Strengthening of the Financial Sector, Indonesian law does not recognize equitable principles in general, including, without limitation, the relationship of a trustee and beneficiary or other fiduciary relationships. Nevertheless, security may be granted to a trustee to be held in trust. However, enforcement of the provisions granting security in favor of third-party beneficiaries and otherwise relating to the nature of the relationship between a trustee (in its capacity as such) and the beneficiaries of a trust in the loan and security documents in the Republic of Indonesia will be subject to an Indonesian court accepting both of the following:

Foreign law as the governing law of those documents

Proof of the application of equitable principles under those documents

## 6. If not, are there any techniques that can be used to achieve substantially the same effect (e.g., parallel debt structures)?

In practice, the parties incorporate the following into the facility agreement:

A provision stipulating that in relation to a jurisdiction in which the courts would not recognize or give effect to the trust, the relationship of the finance parties to the security trustee will be construed as one of principal and agent.

A parallel debt provision.

Furthermore, for an onshore security holding in Indonesia under a facility agreement, the parties would typically appoint a security agent rather than a security trustee since the concept of trust is not recognized in Indonesia.

## 7. If an agent holds security for the lenders rather than a trustee, is it necessary to take new security on a change of lenders? If no, why not? If yes, are there ways to structure the transaction to avoid such a requirement?

Under Indonesian law, a change of lender by way of a transfer certificate or a novation agreement is considered a novation, the effect of which is that the existing security (as an accessory to the facility agreement) would cease to exist. However, Article 1421 of the ICC provides the option for the new lender and any remaining existing lenders to explicitly state that they retain the security created under the security documents to secure the secured liabilities.

Therefore, the parties usually include a provision in the facility agreement that provides that, on the transfer date, each security document and guarantee will be, and the borrower irrevocably confirms that each security document and guarantee continues to be, the legally valid, binding and enforceable obligations of each party to the facility agreement, and the security and guarantee created by each security document and guarantee respectively will continue to be valid and effective.

Please note that there are multiple interpretations of the effect of the application of Article 1421 of the ICC on the security documents. One of the interpretations is that upon the novation, the underlying agreement should be terminated and therefore the security created under the security document should be deemed to be terminated given the accessory nature of the security documents under Indonesian law.

## 8. Under the laws of this jurisdiction, is there any class of asset over which it is difficult or impossible to grant effective and perfected security, or in relation to which any security granted will be of limited effect?

Generally, there is no class of assets over which it is difficult or impossible to grant effective and perfected security. However, please note the limitations set out below.

Personal rights

It is not possible to grant security over a personal right that cannot be transferred to another person, such as a license.

Pledge

There is still uncertainty in relation to the enforceability of a pledge over a bank account in Indonesia due to the following:

Fluctuating balance in a bank account.

The fact that the pledgor still controls the bank account.

Uncertainty about whether a bank account can be the object of a security right under Indonesian law.

The ICC specifies that a pledgee cannot own the pledged assets. The underlying principle is that a creditor may only obtain the proceeds of the pledged object to repay the debt. To the extent that any of the provisions in a pledge bank account agreement gives a security agent the right to appropriate or own money in the account, the provisions could be construed as inconsistent with the literal meaning of Article 1154 of the ICC. In our view, the underlying presumption of the ICC stipulation is that the pledged object has a market value and that value can only be determined by public auction. In the case of a bank account, the value of the pledged object is the same as the value of the money in the bank account.

There is no concept of second ranking in relation to a pledge. Therefore, it is not possible to create another pledge over an object that has been subject to a pledge.

Fiducia security

Any fiducia security (please see the answer to question 11 for the explanation on fiducia security) over receivables or insurance proceeds will not prevent the obligor(s) or the insurer(s) from the following:

Discharging their obligations to the fiducia grantor.

Exercising any set-off rights they may have.

This is until a receipt of acknowledgment is given from the obligor(s) of the granting of the fiducia security by the fiducia grantor to the fiducia grantee or, alternatively, by proper service by a court server of a notice on those obligor(s) in relation to the granting of the fiducia security.

Any fiducia security over receivables or insurance proceeds is enforceable only to the extent that the fiducia security relates to claims arising from an existing contractual relationship between the fiducia grantor and its obligor(s) at the time of execution of the fiducia security. It may not be enforceable to the extent that the fiducia security relates to future claims that do not have their basis in a contractual relationship between the fiducia grantor and its obligor(s) existing at the time of execution of the fiducia security, unless those future claims (which arise from a new contractual relationship) are specifically assigned by the fiducia grantor. The assignment can be effected by notifying the obligors of the receivables of the existence and the granting of the fiducia security over those future claims and the fiducia grantee registering the fiducia security over the future claims in a fiducia registration office.

## 9. Under the laws of this jurisdiction, are there any restrictions on offshore lenders taking security over any class of asset?

Generally there are no such restrictions.

## 10. Must a company receive a corporate benefit in return for giving a guarantee or security? In particular, are there restrictions on the grant of upstream and cross-stream guarantees and security? If yes, briefly what is the effect of these laws?

Best interests of the company

There is no restriction on the grant of upstream and cross-stream guarantees and security. However, under the Company Law, the members of the board of directors (BOD) of a company have a duty to manage the company in its best interests. Therefore, there must be a corporate benefit for the company before the BOD can direct the company to grant a guarantee or a security to a third-party borrower.

If there is no corporate benefit to the company in granting a guarantee or security to a third-party borrower and in the future the company suffers a loss due to the granting of the guarantee or security, the directors may be jointly and severally liable for that loss.

Typically, because whether a corporate benefit exists in any particular set of circumstances is an issue of fact, it is prudent for there to be a "whitewash" procedure by which all organs of the guarantor company (i.e., BOD, the Board of Commissioners (BOC) and General Meeting of Shareholders (GMS)) approve the granting of the guarantee.

Another regulatory process may need to be conducted if the guarantor or the borrower is a publicly listed company or a (directly or indirectly) controlled subsidiary of a publicly listed company (referred to below).

Affiliated party transactions

**General rule**

Under OJK Rule 42, unless exempted, the following are required of a publicly listed company or its (directly or indirectly) controlled subsidiary that carries out an affiliated party transaction (as defined in OJK Rule 42) ("**Affiliated Party Transaction**"):

Undertake a "procedure" in accordance with the publicly listed company's internal policy to ensure that the Affiliated Party Transaction is implemented according to common business practice (i.e., the transaction must be done at arm's length) ("**Internal Procedure**") and keep the documents that are related to the implementation of the transaction.

Use an independent appraiser to determine the fair value of the object as well as the fairness of the Affiliated Party Transaction.

Disclose to the public information regarding the Affiliated Party Transaction in accordance with OJK Rule 42.

Report the transaction (including submitting the disclosure evidence) to the OJK.

In addition, unless exempted, certain Affiliated Party Transactions would require approval from the independent shareholders in a GMS in accordance with OJK Rule No. 15/POJK.04/2020 on Planning and Conducting General Meetings of Shareholders of Public Companies ("**OJK Rule 15**") in the following circumstances:

The value of the Affiliated Party Transaction exceeds the threshold of a material transaction that requires GMS approval as stipulated in OJK Rule No. 17/POJK.04/2020 on Material Transactions and Change of Business Activity.

The Affiliated Party Transaction may potentially disrupt the continuity of business of the publicly listed company.1

The OJK deems that the Affiliated Party Transaction requires approval from the independent shareholders.

The disclosure and reporting to the OJK above must be made, at the latest, by one of the following:

Two business days after the Affiliated Party Transaction has been conducted.

On the same day as the GMS announcement, if the Affiliated Party Transaction needs to be approved by a GMS.

**Exemptions**

The following exemptions are available under OJK Rule 42:

The following Affiliated Party Transactions are some of those that do not need to go through the Internal Procedure, obtain a fairness/valuation from an independent appraiser or be disclosed to the public or reported to the OJK, among other things:

A transaction between the following, as long as the transaction has the same terms and conditions as a transaction that has been approved by a GMS:

The publicly listed company and its employees, members of the BOD or members of the BOC, or any employees, members of the BOD or members of the BOC of a publicly listed company's controlled company (as defined in OJK Rule 42) ("**Controlled Company**").

The Controlled Company and its employees, members of the BOD or members of the BOC, or any employees, members of the BOD or members of the BOC of the publicly listed company.

An ongoing transaction commenced after the publicly listed company conducted its public offering or after the registration statement submitted by the publicly listed company has been declared effective, provided the following conditions are met:

The transaction has satisfied the requirement under OJK Rule 42.

The terms and conditions of the transaction do not change, or if there are changes to the terms and conditions, those changes may not cause losses to the publicly listed company.

The following Affiliated Party Transactions are some of those that do not need to go through the Internal Procedure, obtain a fairness/valuation from an independent appraiser, or be disclosed to the public, but still need to be reported to the OJK within two business days after the transaction:

A transaction whose value does not exceed 0.5% of the paid-up capital of the publicly listed company or does not exceed IDR 5 billion, whichever is lower.

A transaction carried out by a publicly listed company as a result of the implementation of applicable regulations or court decisions.

A transaction between a publicly listed company and its Controlled Company whose shares are at least 99% held by the publicly listed company or between Controlled Companies whose shares are at least 99% held by the publicly listed company.

Affiliated Party Transactions that are considered "business activities"2 of the publicly listed company are exempted from a fairness assessment by an independent appraiser, as well as from a disclosure and reporting obligation, although they still need to do the following: (i) go through the Internal Procedure the first time the transaction is conducted; and (ii) report the transaction in the publicly listed company's annual report or annual financial statements (with a reference in the annual report). If there is a change to the terms and conditions of such an Affiliated Party Transaction that potentially may cause losses to the publicly listed company, the Internal Procedure must be redone.

Conflict of interest transactions

Under OJK Rule 42, in carrying out a conflict of interest transaction (as defined in OJK Rule 42) ("**Conflict of Interest Transaction**"), a publicly listed company must obtain prior approval from the independent shareholders of a company in a GMS in accordance with OJK Rule 15, in addition to securing a fairness opinion from an independent appraiser, disclosing the transaction to the public and reporting the transaction to the OJK. There are certain Conflict of Interest Transactions, however, that are fully exempted from Conflict of Interest Transaction procedures, including the following:

A transaction between the following, as long as the transaction has the same terms and conditions as a transaction that has been approved by a GMS:

The publicly listed company and its employees, members of the BOD or members of the BOC, or any employees, members of the BOD or members of the BOC of a Controlled Company.

The Controlled Company and its employees, members of the BOD or members of the BOC, or any employees, members of the BOD or members of the BOC of the publicly listed company.

An ongoing transaction that commenced after the publicly listed company conducted its public offering or after the registration statement submitted by the publicly listed company has been declared effective, provided that the following conditions are met:

The transaction has satisfied the requirements under OJK Rule 42.

The terms and conditions of the transaction do not change or, if there are changes to the terms and conditions, those changes do not cause losses to the publicly listed company.

There are also other exemption criteria where the Conflict of Interest Transactions are exempted, but they still must be reported to the OJK, at the latest, two business days after the transaction occurs, including the following:

A transaction whose value does not exceed 0.5% of the paid-up capital of the publicly listed company or does not exceed IDR 5 billion, whichever is lower.

A transaction carried out by a publicly listed company as a result of the implementation of applicable regulations or court decisions.

A transaction between a publicly listed company and its Controlled Company whose shares are at least 99% held by the publicly listed company or between Controlled Companies whose shares are at least 99% held by the publicly listed company.

Subsidiary companies

If the guarantee is provided by a publicly listed company to its subsidiary (whose shares are at least 99% held by that publicly listed company) or provided by that publicly listed company's subsidiary (whose shares are at least 99% held by that publicly listed company) to that publicly listed company, the granting of the guarantee only needs to be reported to the OJK no later than two working days after the Affiliated Party Transactions have been conducted.

The guarantee is provided by a publicly listed company to its subsidiary (whose shares are less than 99% held by that publicly listed company) or provided by that publicly listed company's subsidiary (whose shares are less than 99% held by that publicly listed company) to that publicly listed company, the Affiliated Party Transaction procedures as elaborated above must be conducted, assuming that there is no other exemption that would be applicable. A further conflict of interest assessment must be done to check whether the Conflict of Interest Transaction procedures must be followed.

1 Disruption to the continuity of business" means, for instance, if the proposed transaction, in pro forma, causes the publicly listed company to experience a decrease of 80% or more in its revenue or suffer a net loss (rugi bersih).

2 OJK Rule 42 does not provide a definitive definition on what is considered a "business activity," but the transaction should be a business activity that is conducted to generate revenue and should be conducted in a routine, repeated and continuous manner. OJK Rule 17 provides a hint of the definition when it says that "business activities" are business activities that are stated in the public company's articles of association and that have been conducted.

## 11. What type of security interests does your jurisdiction recognise, e.g., pledge, charge, mortgage, hypothecation? In relation to each type of security interest, please state the formalities required to create and perfect that security.

The types of security recognized under Indonesian law are set out below.

Hak tanggungan

A hak tanggungan is a security right over a land right as security for a debt. A land right may include objects that are inseparable from the land (such as buildings and plants). This security right grants a priority right to certain creditors in relation to other creditors.

**The creation of a hak tanggungan**

The grantor must execute a deed of hak tanggungan (APHT) in Indonesian in favor of the grantee before a PPAT (land deed official). The APHT must clearly mention the identity of the parties, their domiciles in Indonesia, the secured debt, the value of the hak tanggungan, and a description of the land.

A hak tanggungan registration can be made online.

The PPAT is obliged to register the APHT with the Land Office (Kantor Pertanahan) within seven working days from the signing of the APHT. The Land Office must register the hak tanggungan in the hak tanggungan land book on the seventh day after it receives a completed application. On the registration date, the hak tanggungan comes into existence, is perfected, and the grantee becomes a priority creditor.

As evidence of the registration of the hak tanggungan, the Land Office issues to the grantee a certificate of hak tanggungan (which will have executorial power equivalent to a valid and binding court decision). If a plot of land is subject to more than one hak tanggungan, they are ranked according to their respective dates of registration. If more than one hak tanggungan is registered on the same date, they are ranked according to the number written on their respective APHTs.

As of July 2020, lenders and land deed officers may register the hak tanggungan through an online system called the HT-el system.

To be able to become a user of the HT-el system, lenders and PPATs must first register their accounts.

Before a lender submits the application for the registration of the hak tanggungan in the HT-el system, several steps need to be conducted by the PPAT, as follows:

Land certificate check, which can also be conducted manually if the land data is not yet available in an electronic form and has not yet been provided in the database of the Ministry of Agrarian and Spatial Planning/National Land Agency.

Reporting of APHT, which includes creating a deed code as an identification of the deed, inputting the data of the deed, uploading the APHT and its supporting data, downloading the deed cover note, and scanning and uploading the signed and stamped cover note.

In general, each of the HT-el services is carried out through the same steps, as follows:

Submitting a request for the HT-el services by entering certain data according to the service required.

Uploading the required documents (if any) and confirming the compatibility of the data uploaded by the PPAT and those of the physical document.

Confirming the request.

Paying the PNBP based on the transfer order letter.

Reviewing the draft of the HT-el services output.

There are three types of output produced by the HT-el services, as follows:

HT-el certificate

Notes (catatan) of the hak tanggungan on the e-land book

Notes (catatan) of the hak tanggungan on the land rights certificate

**Costs and time frame**

The costs for registering a hak tanggungan are as follows:

The PPATs fee for preparing the APHT would be approximately up to 1% of the transaction value.

The maximum amount of PNBP to be paid is IDR 50 million (approximately USD 3,300 using the currency rate of USD 15,000/IDR) for a secured value above IDR 1 trillion.

The period from the registration to the issuance of the certificate of hak tanggungan varies between one week and six months, depending on the Land Office and the status of the land.

Hypothec over a vessel

Hypothec over a vessel is a collateral right over a vessel to secure certain loan payments and gives priority rights to certain creditors over other creditors. The definition of "vessel" includes water vehicles of a certain shape or type that move by wind power, mechanical power or other energy, pulled or tugged, including vehicles with dynamic support power, submarine vehicles, and floating tools and fixed floating buildings (such as oil rigs).

**The creation of a hypothec over a vessel**

Only a vessel that has been registered in the Indonesian Vessel Registry (Daftar Kapal Indonesia) is permitted to be the subject of a hypothec. The main requirements for registration are as follows:

The vessel has a size of at least seven gross tonnage.

The vessel is owned by an Indonesian citizen residing in Indonesia or an Indonesian company that is established under Indonesian law.

If it is owned by a joint venture company, the majority of the shares are owned by an Indonesian citizen.

A hypothec is created by a hypothec deed in Indonesian made before the ship registration and recording official at the place where the vessel is registered and recorded in the Main List of Vessel Registration (Daftar Induk Pendaftaran Kapal). After the registration, the hypothec will constitute a valid priority security interest over the vessel, securing up to the value stated in the hypothec deed.

A grosse deed of hypothec will be issued to the holder of the hypothec, which will have executorial power equivalent to a valid and binding court decision. One or more hypothecs can be created over a vessel. The rank of each hypothec is determined based on the date and number of the hypothec deed.

**Costs and time frame**

The registration costs for a hypothec include the notary fee, which is calculated from the value of the hypothec stated in the grosse deed of hypothec, and the PNBP, which is calculated from the gross tonnage of the vessel. The process of registration of a hypothec usually takes three to seven days.

Pledge

A pledge is a right of a creditor (pledgee) to movable property that is delivered into the possession of the pledgee by a debtor at the time that the pledge is created, and it gives the pledgee a preferential right to the proceeds from the sale of the pledged property over other creditors. Since the pledged property must be in the possession of the pledgee, the right of the pledgee will terminate if the pledged property is no longer in the possession of the pledgee, except if it is lost or stolen from the pledgee.

**The creation of a pledge**

The parties enter into a pledge agreement, and the pledgor delivers the pledged goods to the pledgee. There is no public registration. However, for a pledge over intangible property, there is a requirement to notify the party against which the pledge is to be enforced. The perfection of the pledge depends on the type of pledged property, i.e., the perfection of a pledge over intangible goods is done by way of delivery and the perfection of a pledge over intangible goods is done by way of notification.

For a pledge over shares, in addition to the pledge agreement, there is also typically an irrevocable power of attorney, a power of attorney to sell shares, and various notices or forms.

**Costs and time frame**

The costs for establishing a pledge depend on how the pledge agreement is drawn up and which related steps are taken. The costs increase in the following order, depending on how the pledge agreement is drawn up:

Drawn up privately

Drawn up privately and registered with a notary public to evidence that the document already existed at the time of registration

Drawn up privately and legalized by a notary public to evidence that the signatures are the signatures of the signatories

Drawn up in notarial deed form as prima facie evidence that the persons executing the agreement are the persons they claim to be and that the content of the agreement is as stated

There is no statutory timetable in relation to the documentation and registration of a pledge.

Fiducia security

Fiducia security is regulated under Law No. 42 of 1999 on Fiducia Security. The fiducia grantor transfers title to its asset in a fiduciary capacity to the fiduciary grantee (secured party). A fiducia security is a security right securing the repayment of a debt over the following:

Tangible or intangible movable goods.

Immovable goods that exist now or will exist in the future, can be owned and transferred, registered or unregistered, and cannot be encumbered by a hak tanggungan or hypothec ("**Fiducia Property**").

The Fiducia Property, unless otherwise agreed by the parties, also includes the following:

The products resulting from the Fiducia Property.

Insurance claims of the Fiducia Property.

Unlike a pledge, Fiducia Property remains in the possession of the fiducia grantor. This security right will grant the fiducia grantee a priority right over other creditors.

**The creation of a fiducia security**

To establish a fiducia security, the fiducia grantor and fiducia grantee execute the fiducia agreement in Indonesian and in a notarial deed form.

The fiducia grantee (through a notary) registers the fiducia security at the relevant fiducia registration office through an online registration system. The registration office then records the fiducia security in the Registration Book of Fiducia on the same day as the online registration statement is submitted and when the registration fee has been paid. The fiducia security is established on the date it is recorded in the Registration Book of Fiducia.

**Costs and time frame**

The costs incurred in the registration of fiducia security are as follows:

The notary's fee for the preparation of the notarial deed, which is calculated as follows:

Fiducia security with a value of less than or equal to IDR 100 million and the maximum cost is 2.5% of the fiducia security value.

Fiducia security with a value above IDR 100 million and less than or equal to IDR 1 billion and the maximum cost is 1.5% of the fiducia security value.

Fiducia security with a value exceeding IDR 1 billion and the maximum cost is 1% of the Fiducia Property.

The maximum amount of PNBP to be paid, which is IDR 13.3 million (approximately USD 880 using the currency rate of USD 15,000/IDR).

The fiducia security must be registered within 30 days of the date of the deed of the fiducia security agreement. If there is an error on the fiducia security certificate (except in relation to the security value), a request for correction may be submitted no later than 30 days after the fiducia security certificate is issued. For errors or changes to the security value stated on the fiducia certificate, the fiducia certificate will need to be replaced. There is an amendment fee for such request.

Security over warehouse receipts

Security over warehouse receipts is the newest type of security available in Indonesia under Law No. 9 of 2006 on the Warehouse Receipt System as amended by Law No. 9 of 2011 ("**Warehouse Receipt Law**"). It defines a "warehouse receipt" as a document issued by a warehouse manager evidencing the ownership of goods (any movable goods that can be stored for some time and are generally traded) stored in the warehouse. The warehouse receipt is a certificate of title, and it is therefore transferable and can be provided as security. This security grants priority rights to a certain creditor over other creditors. The warehouse receipt can only be encumbered with one security right. The security also includes any insurance claim.

However, due to the lack of implementing regulations, security over warehouse receipts is rarely used in the market.

**The creation of a security over warehouse receipts**

Under the Warehouse Receipt Law, security over warehouse receipts is created as follows:

The creditor and the borrower enter into a loan agreement and a deed of security agreement.

The creditor notifies the Registration Center (currently under PT Kliring Berjangka Indonesia (Persero)) and the warehouse manager that the warehouse receipt has been encumbered with a security to secure the loan.

After receiving the completed security notification documents, the Registration Center records the security over warehouse receipt in the Registry Book of Security (Buku Daftar Pembebanan Hak Jaminan) and issues a confirmation on the notification of the security encumbrance over the warehouse receipt and a written confirmation to the security grantee, the security grantor and the warehouse manager, the day after the notification at the latest.

The security grantee holds the warehouse security receipt, and therefore the warehouse receipt cannot be doubly encumbered.

**Costs and time frame**

The cost for establishing security over warehouse receipts mainly comprises the fees payable to the notary and the Registration Center. This includes the fees for the preparation, execution and notification of the deed of security agreement.

There is no statutory timetable for the notification of security over warehouse receipts.

## 12. Are there any registration, translation or notarization requirements in relation to security, guarantees, subordination or intercreditor documents?

Please see the answer to question 7 of the "When lending to borrowers" section for registration or notarization requirements in relation to security and guarantee documents. With regard to subordination or intercreditor documents, there is no regulatory requirement for registration or notarization. The answer to question 7 of the "When lending to borrowers" section for translation requirement is also applicable to the security, guarantee and subordination or intercreditor documents.

## 13. Are there any stamp, documentary, registration, notarization or other taxes, duties or fees chargeable in respect of security, guarantees, subordination or intercreditor documents? If yes, what are the amounts and when are they payable?

Other than the registration fees set out in the answer to question 8 of the "When lending to borrowers" section, no documentary, registration, notarization or other similar taxes, duties or fees are payable under the laws of the Republic of Indonesia in relation to the loan and security documents, except that stamp duty at the rate of IDR 10,000 is payable on each of the documents.

# If things go wrong

## 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

Under the Bankruptcy Law, two types of proceedings may be commenced:

Bankruptcy proceedings, by which the debtor loses its power to manage and dispose of its assets (i.e., a liquidation type of bankruptcy).

A legal debt moratorium or suspension of payments proceedings, by which the debtor, on request by a creditor or the debtor itself, is given temporary relief to restructure its debts and continue in business, and ultimately to satisfy its creditors (i.e., a debt reorganization type of bankruptcy).

Bankruptcy proceedings

**Application**

The Bankruptcy Law requires that the bankruptcy petition be filed by a lawyer admitted to practice before the commercial court having jurisdiction over the debtor's legal domicile. If the debtor is a legal entity, the legal domicile of the debtor is that which is stated in its articles of association. Under the Indonesian insolvency regime, as long as there are two creditors to whom unpaid debts are owed and the debtor has failed to pay in full one of its debts that is already due and payable, a petition can be filed to force the debtor to pay.

**Creditors**

The creditors affected by the bankruptcy are not all in the same position. Preferred/secured creditors have a priority claim on the proceeds of the sale of any assets that have been granted as security in their favor. Unsecured/concurrent creditors, on the other hand, share in the division of the remaining assets and obtain satisfaction of their debts in a proportionate percentage, i.e., unsecured/concurrent creditors will share in the money proportionately rather than the first creditor that applies being the first to receive payment. From the date of the declaration of bankruptcy, the unsecured/concurrent creditors can obtain satisfaction of their claims only in the bankruptcy procedure and not through individual enforcement proceedings.

The secured creditors' right to enforce their security is stayed for a maximum of 90 days from the date the debtor is declared bankrupt. Following the stay period, the Bankruptcy Law generally refers to a period of two months for the enforcement of security by secured lenders after the debtor enters into an insolvency situation (i.e., if the debtor does not offer any composition plan during the debt registration meeting, the composition plan is rejected or the approval of the composition plan is rejected by a final and binding decision). The stay period does not apply to any secured creditors' claims that are secured by cash and the creditor's right to a set-off.

Only creditors having a claim in relation to the bankrupt debtor at the time of the bankruptcy declaration may claim payment from the proceeds of the bankruptcy estate. Further, all payment obligations of the debtor that occur after the bankruptcy declaration cannot be paid from the proceeds of the bankruptcy estate, unless the fulfillment of the payment obligations brings benefits to the bankruptcy estate.

**Claims**

The Bankruptcy Law requires that every creditor submit to the curator (similar to a liquidator) its claim in the form of a prescribed written statement that includes whether the creditor concerned has a security right in rem or a statutory priority right. The creditors' claims are then verified at the creditors' meeting.

After all acknowledged creditors have received the full amount of their claims or as soon as the final distribution plan (made by the curator) has become binding, the bankruptcy will end. The curator must announce the completion of the bankruptcy in the same manner as the announcement of the declaration of bankruptcy. The curator will account for its administration and liquidation of the bankruptcy estate to the supervisory judge 30 days after the end of the bankruptcy.

**Appeal or review**

Any cassation (a type of appeal) or civil review process does not affect any action taken by the curator, who is empowered by law to administer and liquidate the bankruptcy estate. If for any reason the declaration of bankruptcy is reversed in a cassation or civil review, actions that are taken prior to the curator being served notice of that cassation or civil review are legal and binding on the debtor.

Suspension of payments proceedings

**Petition**

A creditor that foresees that its debtor would not be able to continue to pay its debts when they become due and payable and a debtor that is unable or predicts that it will be unable to pay its debts when they become due and payable may file a petition for the suspension of the payment of debts with the relevant commercial court. The aim of the suspension of payments is to provide the debtor with more time to either meet its obligations or come to an agreement with its creditors to restructure the debts. A suspension of payments can easily be converted into a bankruptcy when it is clear that the suspension will not be successful.

A suspension of payments is initially granted for a maximum of 45 days. This is known as a "temporary" suspension of payments.

Pursuant to the Bankruptcy Law, a debtor may also file a petition for the suspension of payments after a petition for bankruptcy declaration has been filed against it. If petitions for both a suspension of payments and bankruptcy are reviewed by the court at the same time, the petition for the suspension of payments prevails and it must be decided first. Although it is not a legal remedy as such (i.e., appeal or civil review), a petition for the suspension of payments will effectively postpone the bankruptcy process for a certain period.

**Composition plan**

The Bankruptcy Law requires the debtor petitioning the suspension of payments ("**Applicant**") to submit its settlement or composition plan with its creditors at the time that or after the debtor files the petition for the suspension of payments. A composition plan with creditors is an agreement made between the Applicant and its creditors for the settlement or arrangement for a discharge of the debts of the Applicant. The composition plan must set out the proposed timetable under which the Applicant will repay its debts and whether the debts will be fully or partially repaid. In order to be valid and effective, a composition plan must be approved at a creditors' meeting by the following:

Affirmative votes of more than half of the concurrent creditors that are present at the meeting, provided that concurrent creditors voting in favor hold at least two-thirds of all accepted or provisionally accepted unsecured claims held by the concurrent creditors present at the meeting (Votes are only taken from the concurrent creditors present at the meeting); and

Affirmative votes of more than half of the secured lenders that are present at the meeting, provided that secured lenders voting in favor hold at least two-thirds of all accepted or provisionally accepted secured claims held by the secured creditors present at the meeting (Votes are only taken from the secured creditors present at the meeting).

The composition plan, once ratified, binds all of the unsecured creditors and secured creditors (who voted in favor of the plan), including those unsecured creditors that voted against the acceptance of the composition plan and that were not present or represented at the creditors' meeting.

**Declaration of bankruptcy if a composition plan is not ratified**

If the composition plan is not available at the first hearing, during the temporary suspension of payments or when the creditors have not yet cast votes in relation to the composition plan, the creditors, at the request of the Applicant, may grant an extension so that the suspension of payments situation becomes a "permanent" suspension of payments (i.e., a reference to the period beyond the temporary suspension of payments). However, the total suspension of payments period may not exceed 270 days. During the permanent suspension of payments period, the Applicant and the creditors may continue to negotiate the composition plan. If a permanent suspension of payments is not granted, or if at the expiry of the suspension of payments period there is no decision in relation to the composition plan, the administrator (a person appointed during the suspension of payments proceedings who, together with the debtor, administers the assets of the debtor) must notify the court and the court will immediately declare the Applicant bankrupt.

**Effect on the payment of debts and secured creditors**

The debtor cannot be forced to pay its debts during the suspension of payments period. However (unlike in a bankruptcy situation), a debtor subject to a suspension of payments may manage or dispose of its assets and obtain loans and secure its unsecured assets, provided that those acts have been authorized by the administrator and/or the supervisory judge.

A secured creditor cannot enforce its rights during a suspension of payments period.

**Termination of the suspension of payments**

A suspension of payments may be terminated by the commercial court on a request submitted by the administrator, the supervisory judge or any of the creditors, or at the commercial court's initiative in certain circumstances, including if the Applicant transfers rights to any part of its assets without authorization from the administrator or if the Applicant's position is such that a suspension of payments is no longer feasible.

## 2. Is it possible to obtain a moratorium before insolvency?

Yes. The procedure to obtain a moratorium (known as a suspension of payments in Indonesia) is set out in the answer to question 1 of this section.

## 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Yes. Under Indonesian law, there are two different routes by which pre-insolvency transactions can be set aside.

ICC

Under the ICC, any action taken by a debtor may be nullified if:

That action was not required by law or pursuant to the terms of a bona fide agreement (nonobligatory action).

The action prejudiced the interests of (other) creditors.

The debtor and the party that benefited from the action (or counterparty) knew or should have known that the action would prejudice creditors.

Bankruptcy Law

The Bankruptcy Law recognizes the concept of fraudulent conveyance (actio pauliana).

Under the Bankruptcy Law, a transaction or action carried out one year prior to a bankruptcy declaration may be nullified or set aside. There is a legal presumption of deemed knowledge of prejudice of other creditors if the action was performed within the one-year period prior to the bankruptcy declaration and that action:

Constitutes an agreement under which the obligations of the debtor were more onerous than the obligations of the counterparty.

Constitutes the payment of or granting of security for debts that were not due and payable.

Was performed with an affiliated party (which is detailed in the Bankruptcy Law).

In addition, under the Bankruptcy Law, payment of a due and payable debt (or satisfaction of claimable obligations) by the debtor may also be nullified if one of the following can be proved:

It is evident that the counterparty that received the payment was aware that a petition for a bankruptcy declaration had been filed against the debtor.

The payment was made pursuant to deliberations (or a collaboration) between the debtor and the counterparty with the intention to pay the counterparty ahead of other creditors.

## 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

The lender can enforce the security after the occurrence of an event of default subject to the terms of the relevant security documents. However, a secured lender may need to obtain a court order permitting the enforcement of its security where, for example, the enforcement of security involves a public auction through a court. The qualifications, as well as the enforcement processes in relation to the different types of security, are also set out below.

Qualifications

If the debtor is subject to a declaration of bankruptcy or a suspension of payments, one of the following qualifications will apply in relation to the processes:

The right of enforcement of the secured creditor (i.e., the lender) after the declaration of bankruptcy is subject to a stay period of up to 90 days (counted from the date of the decision declaring bankruptcy), during which the secured creditor (i.e., the lender) is prevented from enforcing its rights over the security. The stay period will be terminated if, following the declaration of bankruptcy, the debtor enters into an insolvency situation or when the Supreme Court annuls the bankruptcy. This stay period, however, does not apply to creditors that have rights over secured cash deposits or rights to set off debts.

The right of enforcement of a creditor (i.e., the lender) is deferred during a suspension of payments of the debtor.

As far as we are aware, no restrictions apply before a creditor may enforce its security apart from the stay periods mentioned above.

Specific security interests

**Enforcement of a hypothec over a vessel**

If there is an event of default, a creditor must serve the borrower with a clear and unequivocal letter of demand to enforce its security rights.

The creditor, without obtaining a court order, may proceed to sell the hypothec object by public action or private sale (if the highest price could be achieved and it would be profitable for all parties concerned) if the following events occur:

The borrower does not comply with the letter of demand.

The grosse deed of hypothec contains an agreement or a promise for the holder of the security/creditor (as the hypothec grantee) to sell the object of security on the default of the debtor.

Both the auction and private sale methods must follow the procedure set out in the statutory regulations.

This holder's right of self-enforcement is referred to as simplified enforcement (parate executie) because there is no court involvement in this process.

If the grosse deed of hypothec does not contain an agreement or a promise for the holder of security to sell the object of security on the debtor's default, the holder of hypothec must submit an application of enforcement to the court. After a prescribed process has been completed, the court will issue an auction order for the object of hypothec to be sold by public auction.

If there is resistance from the hypothec grantor at the enforcement stage (even if the deed of hypothec contains an agreement or a promise for the hypothec holder to sell the vessel on the debtor's default), the hypothec grantee may apply to a court for a court order.

**Enforcement of a pledge**

If the pledgor defaults, the pledgee may serve the borrower with a clear and unequivocal letter of demand, and if it is not complied with, the pledgee can use the letter of demand to establish the borrower's failure to comply.

If the pledgor does not comply with the letter of demand, the pledgee may enforce its right over the pledged property by way of public auction or by private sale if the pledgor and the pledgee agree. It is generally accepted in practice that the pledgee can sell the shares through a private sale, as long as the pledgor has authorized the pledgee to do so.

There are no statutory provisions in relation to the method of enforcement for a pledge over bank deposits. However, in practice, the enforcement can be conducted by means of a set-off of the monies deposited in the account against the outstanding debt. This means that the enforcement of pledge over bank deposits does not follow the general procedures for the enforcement of a pledge.

**Enforcement of a fiducia security and a hak tanggungan**

A creditor must serve the borrower with a clear and unequivocal letter of demand before enforcing its security rights. There is no strict timeline in relation to when the letter of demand must be served. Unless it is specifically stipulated under the financing documents, the letter of demand can be served on the occurrence of an event of default. If the borrower does not comply with this letter, then the creditor may proceed with the following methods to enforce its security rights:

Rely on the executory title in the certificate of fiducia security or certificate of hak tanggungan.

Sell the fiducia object or hak tanggungan object (if the deed of hak tanggungan contains an agreement or a promise for the holder of hak tanggungan to sell the hak tanggungan object on the default of the debtor) by public auction.

Sell the fiducia object or hak tanggungan object by private sale if the highest price can be achieved and it would be profitable for all the parties concerned.

The private sale must follow the procedure provided for in the statutory regulations (e.g., an announcement regarding the proposed private sale must be published in at least two newspapers circulated in the area where the fiducia object or hak tanggungan object is located).

**Enforcement of a security over warehouse receipts**

A creditor must serve the borrower with a clear and unequivocal letter of demand before enforcing its security over warehouse receipts. If the borrower does not comply with this letter, then the creditor may proceed with the enforcement of its security rights.

The creditor (the security grantee) can sell the goods without first obtaining a court order. However, it must notify its intention to the owner of the warehouse receipt (the security grantor), the warehouse manager and the Registration Center at least three days before the sale of the goods.

To enforce the security over a warehouse receipt, the creditor can sell the goods as follows:

By public auction in accordance with the prevailing laws and regulations.

By private sale if this method will yield the best price that will benefit both parties.

The creditor can apply the sale proceeds to the loan after making deductions for the sale and management costs.

**Enforcement of a guarantee**

Generally, the procedures of enforcing a guarantee in Indonesia are the same as suing a party that is in default of its contractual obligation. A lender will need to lodge a lawsuit against the guarantor in a court. The guarantor will have a chance to present its pleadings, documentary evidence and witnesses to challenge the enforcement of guarantees.

## 5. Do any limitation periods apply in relation to bringing an action to enforce security?

The limitation period that applies in respect of bringing an action to enforce security relates to the concept of statutory limitation under the ICC, which generally states that claims in relation to the repayment of a loan are permitted to be filed within 30 years.

If a claim is not brought within 30 years, such claim will be barred. However, Article 1967 of the ICC does not stipulate when the 30-year period commences. Several legal scholars are of the opinion that the 30-year period commences when a right can be exercised (i.e., when the right first arose).

As discussed in the answer to question 1 in this section, after the stay period of up to 90 days following the bankruptcy declaration, the secured creditor only has two months after the debtor enters into an insolvency situation (i.e., if the debtor does not offer any composition plan during the debt registration meeting, the composition plan is rejected or the approval of the composition plan is rejected by a final and binding decision) to enforce its rights over the collateral but subject to the qualifications set out in the answer to question 4 of this section. After the two-month period, the curator has the right to sell all collateral of the debtor to pay off its debts. This includes collateral over which the debtor has granted security. If the curator exercises this right (in practice, after discussions with any secured creditors), the proceeds of the sale in relation to collateral over which the debtor has granted security will be given to the relevant secured creditor.

## 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

Please see the answer to question 4 of this section in relation to the enforcement of security generally.

## 7. Are there any particular legal or practical difficulties or delays in enforcing security?

In Indonesia, the process of the enforcement of security is usually subject to challenge by the debtor/obligor (e.g., to seek to invalidate the loan and frustrate the enforcement). In practice, debtors and obligors are often uncooperative during the enforcement process and often take defensive legal action to maintain their assets.

In addition, a provision in a loan or security document that a calculation, determination or certificate will be conclusive and binding will not apply to a calculation, determination or certificate that is given unreasonably, arbitrarily or without good faith, or that is fraudulent or manifestly inaccurate and will not necessarily prevent a judicial enquiry into the merits of any claim.

Further, the enforceability of an obligation in Indonesian-law-governed documents in general may be affected or limited by the following:

The general defenses available to obligors under Indonesian law in respect of the validity and enforceability of loan and security documents.

The provisions of any applicable current or future bankruptcy (kepailitan or faillissement), insolvency, fraudulent conveyance (actio pauliana), reorganization, moratorium/suspension of payments (penundaan kewajiban pembayaran hutang or surseance van betaling) and other or similar laws of general application relating to or affecting the enforcement or protection of creditors' rights.

## 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

There are no specific requirements for an offshore lender to enforce its security.

## 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

It is common for the parties to choose arbitration to resolve their disputes in relation to cross-border transactions, and there are various reasons for doing so. Firstly and most importantly, by virtue of the New York Convention, an arbitration award is enforceable in Indonesia. Secondly, the parties can typically choose arbitrators who have relevant expertise to hear and resolve the dispute. Thirdly, arbitration is a neutral way to resolve the parties' dispute (in contrast to the local courts). Fourthly, the arbitration process is relatively quick in most cases. Although arbitration is generally preferable in a cross-border transaction, the parties should be cautious in choosing the seat of arbitration. The choice of the seat of arbitration will have a significant impact on the arbitration process, as the law governing the arbitration process will be the law of that seat of arbitration.

While there are advantages to choosing arbitration as set out above, there are also some disadvantages. Foreign arbitration awards are not automatically enforceable in Indonesia. Enforcement involves a three-stage process. The award must be registered in Indonesia. On registration, a winning party files an application to obtain leave for enforcement ("**Exequatur**") from the Central Jakarta District Court. Once the Exequatur is granted, a successful party can seek the district court's assistance to enforce the award in Indonesia. There is also a possibility that the opposing party will try to avoid or obstruct the arbitration proceedings by not participating in the constitution process of the arbitral tribunal. Further, if the unsuccessful party does not want to voluntarily honor the award, the court's assistance will be required to enforce the award.

A foreign (non-Indonesian) court judgment is not enforceable in the Republic of Indonesia, although this type of judgment could be admissible as inconclusive evidence in proceedings on the underlying claim in an Indonesian court. Although Indonesian courts are in a position to determine the applicable rules of foreign laws, in practice however they have from time to time applied the laws of the Republic of Indonesia notwithstanding the choice of law provisions in the relevant documents. A non-Indonesian judgment may be given the evidentiary weight an Indonesian court considers appropriate and reexamination of the issues de novo would be required before an Indonesian court to enforce the claim in the Republic of Indonesia. The entire civil proceedings process to obtain a final and binding court judgment in Indonesia up until the Supreme Court level could take more than one year.

With regard to a hybrid provision that allows the parties to opt for either arbitration or litigation, at the outset, the provision is not prohibited under Indonesian law to be included in an agreement based on the freedom of contract principle. However, the Indonesian court may view that there is no "exclusive jurisdiction" for disputes arising from an agreement to be settled through arbitration. Therefore, an Indonesian court may decide that it has jurisdiction over claims submitted by the borrower in relation to the agreement to the Indonesian court.

Further, if the hybrid provision only allows the lenders to opt for arbitration or litigation as they see fit, the Indonesian courts may deem the provision not enforceable on the basis that the arrangement is one-sided (only for the benefit of the lender). Additionally, the court may apply the right to opt for arbitration or litigation to the borrower as well.

## 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

Despite the freedom of contract principle under Indonesian law, there is a risk that Indonesian courts would take the view that asymmetrical jurisdiction clauses are not enforceable because the arrangement is one-sided (only for the benefit of the lender). Further, the risk from an Indonesian court proceedings perspective is that the court may apply the right to choose the jurisdiction and the right to litigate to the borrower as well. This will allow the borrower to bring a claim related to the Finance Documents in a different jurisdiction as it sees fit.

In addition, if the clause allows the lender (only) to choose to litigate through court litigation or arbitration, the Indonesian courts may view that there is no "exclusive jurisdiction" for disputes arising from the Finance Documents to be settled through arbitration. Consequently, an Indonesian court may decide that it has jurisdiction over the dispute submitted by the borrower to the Indonesian court.

# Working digitally

## 1. Is it possible for documents to be executed electronically (whether by the manual insertion of a digital signature or the use of an e-signing platform) under the laws of this jurisdiction? If so, is this limited to only particular types of finance documents?

Indonesian law generally recognizes e-signatures for the following: (i) as a basis to prove an agreement or acceptance; and (ii) for evidentiary purposes. The validity requirement of electronic signatures under Indonesian law indicates that the manual insertion of a scanned signature is not acceptable. Indonesian law only acknowledges electronic signatures generated by e-signature providers and recognizes two types of electronic signatures: certified and uncertified electronic signatures. Certified electronic signatures are signatures generated by locally registered electronic signature providers. Uncertified electronic signatures are signatures generated by unregistered electronic signature providers (e.g., foreign electronic signature providers). Both types of electronic signatures are acknowledged and admissible as evidence in court, but an uncertified electronic signature has less evidentiary value before the courts. Some certified electronic signature providers in Indonesia are PrivyId, Vida, Digisign, Peruri Sign, TekenAja, Tilaka and Xignature.

However, there are some documents, such as security documents, that must be executed in a notarial deed form and the parties must appear and sign the documents before a notary.

While there is no specific restriction on the types of documents that can be signed using an electronic signature, in practice, most parties and government agencies in Indonesia still refer to and require manually (wet) signed hard copy documents. Currently, for contracts or documents that may be disputed, the best practice is to obtain a wet signature.

## 2. Where the witnessing of a signing is contemplated, is it possible for the witness to verify the signature over a live video call?

There is no requirement to have witnesses when signing a document, unless the document is executed in a notarial deed form. The execution of a notarial deed requires at least two witnesses. The witnesses must sign the deed in front of the notary. If the witnesses do not appear before the notary, the document will be deemed to be a privately drawn document and cannot be considered complete evidence (it is considered prima facie evidence to the parties named as signatories thereto only if such parties acknowledge that they signed the document).

## 3. Is it possible to register/perfect security electronically without wet ink signatures?

Currently, it is not possible to perfect security electronically without wet ink signatures. There are requirements that security documents such as land mortgages, fiducia security and security over warehouse receipts be executed in a notarial deed form. The parties must appear and sign the security document before a notary. Although there is no requirement for a pledge agreement and other Finance Documents to be executed in a notarial deed form, it is common practice to execute them in a notarial deed form. Under Indonesian law, a notarial deed is considered binding and complete evidence (prima facie). It does not need any additional evidence to prove its existence and correctness, unless proven otherwise. If any information contained in a notarial deed is challenged, then the burden to prove the challenge lies solely with the challenger.

Indonesian law does not require an agreement to be made in notarial deed form. However, for authentication purposes before the court, a notarial deed is considered an authentic deed, as well as binding and complete (prima facie) evidence.

## 4. Are there any other legal restrictions that may prevent the parties from executing a finance transaction electronically?

No, there are no such restrictions. However, as mentioned above, most parties and government agencies in Indonesia still require manually (wet) signed hard copy documents. For contracts or documents that may be disputed, the best practice is to obtain a wet signature.

# Contributors

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This chapter was prepared by HHP Law Firm.

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